

UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WASHINGTON  
AT SEATTLE

KELLY MARIE SCHURR,	)	CASE NO. C12-6083-JLR-MAT
	)	
Plaintiff,	)	
	)	
v.	)	REPORT AND RECOMMENDATION
	)	RE: SOCIAL SECURITY DISABILITY
CAROLYN W. COLVIN, Acting	)	APPEAL
Commissioner of Social Security,	)	
	)	
Defendant.	)	
_____	)	

Plaintiff Kelly Marie Schurr proceeds through counsel in her appeal of a final decision of the Commissioner of the Social Security Administration (Commissioner). The Commissioner denied plaintiff's applications for Disability Insurance Benefits (DIB) and Supplemental Security Income (SSI) after a hearing before an Administrative Law Judge (ALJ). Having considered the ALJ's decision, the administrative record (AR), and all memoranda of record, the Court recommends that this matter be REVERSED and REMANDED for further proceedings.

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**FACTS AND PROCEDURAL HISTORY**

Plaintiff was born on XXXX, 1979.<sup>1</sup> She has a high school education and previously worked as a hand packer. (AR 34.)

Plaintiff filed an application for DIB and SSI on January 18, 2008, alleging disability beginning July 9, 2007. She is insured for DIB through September 30, 2012. (AR 17.) Plaintiff's application was denied at the initial level and on reconsideration. Plaintiff timely requested a hearing.

On February 11, 2010, a hearing was held by ALJ Larry Kennedy, taking testimony from plaintiff and a vocational expert. (AR 43-82.) On April 22, 2010, the ALJ issued a decision finding plaintiff not disabled. (AR 113-29.) Plaintiff timely appealed to the Appeals Council, which remanded the case to the ALJ for rehearing. (AR 130-33.)

On February 27, 2012, ALJ Verrell Dethloff held a second administrative hearing, taking testimony from plaintiff and a medical expert. (AR 83-108.) On March 9, 2012, the ALJ issued a decision finding plaintiff not disabled. (AR 14-37.)

Plaintiff again timely appealed. The Appeals Council denied plaintiff's request for review on November 6, 2012 (AR 1-5), making the ALJ's decision the final decision of the Commissioner. Plaintiff appealed this final decision of the Commissioner to this Court.

**JURISDICTION**

The Court has jurisdiction to review the ALJ's decision pursuant to 42 U.S.C. § 405(g).

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<sup>1</sup> Plaintiff's date of birth is redacted back to the year of birth in accordance with Federal Rule of Civil Procedure 5.2(a) and the General Order of the Court regarding Public Access to Electronic Case Files, pursuant to the official policy on privacy adopted by the Judicial Conference of the United States.

**DISCUSSION**

The Commissioner follows a five-step sequential evaluation process for determining whether a claimant is disabled. *See* 20 C.F.R. §§ 404.1520, 416.920 (2000). At step one, it must be determined whether the claimant is gainfully employed. The ALJ found that, although plaintiff had worked since the alleged onset date, the work activity did not rise to the level of substantial gainful activity. At step two, it must be determined whether a claimant suffers from a severe impairment. The ALJ found plaintiff's fibromyalgia severe. Step three asks whether a claimant's impairments meet or equal a listed impairment. The ALJ found that plaintiff's impairments did not meet or equal the criteria of a listed impairment.

If a claimant's impairments do not meet or equal a listing, the Commissioner must assess residual functional capacity (RFC) and determine at step four whether the claimant has demonstrated an inability to perform past relevant work. The ALJ found plaintiff able to perform light work as defined in 20 C.F.R. § 404.1567(b) and § 416.967(b), that is, able to lift up to twenty pounds occasionally, lift and carry up to ten pounds frequently, walk/stand (with normal breaks) for about six hours in an eight-hour day, and sit (with normal breaks) for about six hours in an eight-hour day. With that assessment, the ALJ found plaintiff able to perform her past relevant work as a hand packer.

If a claimant demonstrates an inability to perform past relevant work, the burden shifts to the Commissioner to demonstrate at step five that the claimant retains the capacity to make an adjustment to work that exists in significant levels in the national economy. Although the ALJ found plaintiff not disabled at step four of the sequential evaluation, he also proceeded in the alternative to step five, finding plaintiff not disabled using the Medical-Vocational

Guidelines as a framework.<sup>2</sup>

This Court's review of the ALJ's decision is limited to whether the decision is in accordance with the law and the findings supported by substantial evidence in the record as a whole. *See Penny v. Sullivan*, 2 F.3d 953, 956 (9th Cir. 1993). Substantial evidence means more than a scintilla, but less than a preponderance; it means such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *Magallanes v. Bowen*, 881 F.2d 747, 750 (9th Cir. 1989). If there is more than one rational interpretation, one of which supports the ALJ's decision, the Court must uphold that decision. *Thomas v. Barnhart*, 278 F.3d 947, 954 (9th Cir. 2002).

Plaintiff argues the ALJ improperly considered a lack of objective findings in evaluating her disability from fibromyalgia. She contends the ALJ did not give specific and legitimate reasons for rejecting the opinions of treating physicians Judith Fleming, M.D., and David Pong, M.D., and requests remand for further consideration of her RFC. The Commissioner argues that the ALJ's decision is supported by substantial evidence and should be affirmed.

#### Consideration of Fibromyalgia and Objective Evidence

Preliminarily, plaintiff contends the ALJ erred by rejecting her testimony as well as opinions from the treating physicians "based on the lack of objective findings in this fibromyalgia case." (Dkt. 16 at 3.) "Plaintiff argues that fibromyalgia is "a disease which

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<sup>2</sup> The Medical-Vocational Guidelines, commonly known as "the grids," present, in table form, a short-hand method for determining the availability and numbers of suitable jobs for claimants. *See* 20 C.F.R. Pt. 404, Subpt. P, App 2. Each grid presents various factors relevant to a claimant's ability to work, such as age, education, and work experience. The purpose of the grids is to streamline the administrative process and encourage uniform treatment of claims. *Tackett v. Apfel*, 180 F.3d 1094, 1101 (9th Cir. 1999.)

01 eludes objective measurement.” (*Id.* at 4.) Therefore, plaintiff suggests, because she has  
02 fibromyalgia, “she is not required to provide objective medical evidence to support her  
03 complaints.” (*Id.* at 5.)

04 As plaintiff acknowledges, the issue presented is not whether she has been diagnosed  
05 with fibromyalgia. The ALJ found she has this condition, and further found it severe at step  
06 two of the sequential evaluation. (AR 17.) Rather, the issue presented is whether plaintiff is  
07 disabled within the definition of the Social Security Act, that is, whether she is unable “to  
08 engage in any substantial gainful activity by reason of any medically determinable physical or  
09 mental impairment or combination of impairments that can be expected to result in death or that  
10 has lasted or can be expected to last for a continuous period of not less than 12 months.” 42  
11 U.S.C. § 416(i)(1). In this regard, “[t]he claimant bears the burden of proving that she is  
12 disabled.” *Meanel v. Apfel*, 172 F.3d 1111, 1113 (9th Cir. 1999) (quoting *Johnson v. Shalala*,  
13 60 F.3d 1428, 1432 (9th Cir. 1995)).

14 Here, plaintiff contends the ALJ did not give legally sufficient reasons for disregarding  
15 the opinions of treating physician Judith Fleming, M.D. and David Pong, M.D. She also  
16 disputes the ALJ’s reliance on a lack of objective findings in considering plaintiff’s subjective  
17 symptom testimony and the lay witness statements of two family members.

18 On the one hand, it is correct, as noted by the Commissioner, that the ALJ did not rely  
19 solely on a lack of objective findings to evaluate the evidence. For example, the ALJ  
20 discounted the evidence in question as overly reliant on plaintiff’s subjective pain complaints,  
21 which the ALJ found not credible. Furthermore, as conceded by plaintiff, it is correct that Dr.  
22 Fleming’s notes do not contain a great degree of detail or objective findings.

01 On the other hand, plaintiff disputes the ALJ's reasoning that Dr. Fleming did not  
02 provide any objective findings to support her conclusions, noting Dr. Fleming's observation of  
03 plaintiff's response to painful stimulus and her fatigue. Similarly, plaintiff cites Dr. Pong's  
04 observations of her psychomotor slowing and fatigue, and lack of response to treatment.  
05 Plaintiff also disputes the ALJ's assessment of her credibility, arguing a lack of substantial  
06 evidence support for the conclusion that she failed to follow treatment recommendations or  
07 performed daily activities inconsistent with disability for any prolonged period. She suggests  
08 that her lack of a significant earnings record is explained by her age and relatively recent  
09 graduation from high school.<sup>3</sup>

10 Although the credibility of plaintiff's testimony about symptoms and limitations due to  
11 her impairments is closely connected to the ALJ's evaluation of the evidence, the Court agrees  
12 with plaintiff that the ALJ's focus on a lack of objective findings to support disability was  
13 misplaced, or, at least, insufficiently explained. The ALJ cited a lack of "objective signs of  
14 severe or debilitating pain such as weight loss, atrophy, muscle loss, or any neurological or  
15 rheumatological findings[.]" as a reason to discount her testimony, noting a normal neurology  
16 examination in August 2007, normal lab findings in September 2007, and normal examinations  
17 on January 16, 2008, November 5, 2008, and September 17, 2009. (AR 24-27.) The ALJ  
18 specifically discounted the opinions of Drs. Nixon, Fleming, and Kolbo because of a lack of  
19 "objective findings to support their conclusion the claimant was totally disabled" and a lack of  
20 evidence in the treatment records of these doctors "to support such a significant level of

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22 <sup>3</sup> If, as plaintiff indicates, she did not graduate high school until 2001 (AR 284), the record does not explain why she was enrolled in high school through the age of twenty one.

01 limitations.” (AR 30-31.) The ALJ’s assessment of the statements from plaintiff’s mother  
02 and from her husband relied, in part, on the fact that “any limitations they did observe are  
03 unsupported by the objective record,” emphasizing that “[t]he cumulative effect of lay witness  
04 observations cannot be an allowance of disability benefits where the objective medical record  
05 does not warrant it.” (AR 32.)

06       The gravamen of the Commissioner’s argument is that if, in fact, fibromyalgia is a  
07 disease that eludes objective measurement, then the credibility of plaintiff’s subjective  
08 allegations become even more central, and evidence that relies primarily on those allegations is  
09 particularly subject to question. Ultimately, the point may be correct. Here, however, the  
10 ALJ relied strongly on the lack of objective findings to support not only the existence of  
11 fibromyalgia, but also to support any resulting disability therefrom. The Court finds a lack of  
12 competent evidence in the record that would establish what these findings should be. While  
13 the ALJ questions the lack of weight loss, atrophy, muscle loss, or any neurological or  
14 rheumatological findings (AR 24), no doctor has opined that such findings are actually  
15 indicative of disabling fibromyalgia pain. *See, e.g., Rohan v. Chater*, 98 F.3d 966, 970 (7th  
16 Cir. 1996) (“ . . . ALJs must not succumb to the temptation to play doctor and make their own  
17 independent medical findings.”). The Court finds it necessary to remand this case to require  
18 the ALJ to explain his reliance on a lack of “objective medical evidence” to support plaintiff’s  
19 claim of disability.

20       Plaintiff also takes issue with the fact that the ALJ’s assessment of her functional  
21 capacity is not consistent with any physician of record. However, “there is no requirement in  
22 the regulations for a direct correspondence between an RFC finding and a specific medical

01 opinion on the functional capacity in question.” *Chapo v. Astrue*, 682 F.3d 1285, 1288 (10th  
02 Cir. 2012). Indeed, opinions on issues that are reserved to the Commissioner, such as RFC or  
03 ability to perform work, are never entitled to controlling weight or special significance.  
04 Otherwise, the medical source would have the authority to make the determination or decision  
05 about whether an individual is under a disability, in abdication of the Commissioner’s statutory  
06 responsibility to determine whether an individual is disabled. 20 C.F.R. § 404.1527(e) and §  
07 416.927(e). *See also* Social Securing Ruling 96-5p.

08 **CONCLUSION**

09 For the reasons set forth above, this matter should be REMANDED for further  
10 administrative proceedings.

11 DATED this 22nd day of July, 2013.

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13 Mary Alice Theiler  
14 United States Magistrate Judge  
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